

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 THE OSTROM COMPANY,

4 Petitioners,

Case No. 05-2-0017

5 v.

6 WHATCOM COUNTY,

FINAL DECISION AND ORDER

7 Respondent.
8
9

10 **I. SYNOPSIS**

11 The tension between farming and nearby residential uses often revolves around odor and
12 potential chemical impacts on soil and water of typical farming practices. Animal waste from
13 dairy farms and chicken farms, fertilizers and sprays, and composting silage are just some
14 of the traditional types of agricultural activity that may be offensive to neighboring
15 landowners. The Growth Management Act (GMA) anticipates such tensions and places a
16 limitation on a jurisdiction's ability to regulate agricultural uses on designated agricultural
17 lands, provided they are undertaken in accordance with best management practices. RCW
18 36.70A.060. This limitation arises out of the GMA mandate to preserve agricultural lands for
19 agricultural uses.
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23 In this case, Whatcom County seeks to limit the extent of the production of mushroom
24 substrate on agricultural lands used for mushroom growing because of odor and other
25 impacts on neighboring landowners. Whatcom County argues that production of mushroom
26 substrate is not "agricultural" and, even if it is considered agricultural activity, that such
27 regulation is within the County's police powers.
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30 In determining that the on-farm production of mushroom substrate is agricultural activity, the
31 Board looked to the degree to which mushroom substrate is essential to mushroom growing.
32 The evidence in the record demonstrates that mushroom substrate is the soil in which

1 mushrooms are grown commercially. Although mushroom substrate could be produced off-
2 farm, it is intimately connected with the essential nature of mushroom growing and is an
3 important activity for the mushroom farmer. The Board finds that on-farm production of
4 mushroom substrate for use on that farm is agricultural activity for which agricultural lands
5 must be conserved.
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8 The regulations at issue in this case are regulations about where mushroom substrate may
9 be produced within designated agricultural lands. The County argues that it has authority to
10 determine where agricultural activity may occur within such designated natural resource
11 lands. The Board finds that the GMA places a limitation upon the County's ability to
12 regulate the location of agricultural activity in designated agricultural lands. RCW
13 36.70A.060 requires the County to conserve agricultural lands such that the use of lands
14 adjacent to agricultural lands will not interfere with agricultural activity "in the accustomed
15 manner and in accordance with best management practices." By adopting regulations
16 limiting the use of agricultural land for the agricultural activity of on-farm mushroom
17 substrate production to respond to neighbor complaints, the County has failed to discourage
18 incompatible uses and thereby failed to conserve agricultural lands. While the County may
19 require that mushroom substrate production occur in accordance with best management
20 practices, the regulations here are not linked to such a determination.
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23
24 Petitioner also challenges the compliance of the Ordinance with two other goals of the GMA
25 – economic development (Goal 5) and property rights (Goal 6). The Board finds that the
26 Ordinance is not inconsistent with the County's economic development plan policies or the
27 GMA economic development goal because the goal and policies do not preclude regulation
28 of any particular industry. The Board finds that the property rights goal allegation here is
29 subsumed in the agricultural challenges and considers it in the invalidity request.
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1 Petitioner also challenges the sufficiency of the County's submission of its proposed draft
2 ordinance to the Department of Community, Trade and Economic Development (CTED)
3 (RCW 36.70A.106). The parties agree that the first draft was provided to CTED and the
4 Board finds that the amendments made in the course of the public process did not require a
5 further submission prior to adoption of the final development regulation.
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8 Petitioner further challenges the County's compliance with RCW 36.70A.370 – utilization of
9 the Attorney General's process for ensuring that administrative and regulatory adoptions do
10 not result in unconstitutional takings of private property. The County established that this
11 process had been utilized through the declaration of the deputy prosecuting attorney who
12 advised the County Council.
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15 Finally, although the Board finds the Ordinance non-compliant, it declines to impose a
16 determination of invalidity upon the ordinance. Absent a showing that the County has
17 unreasonably delayed in achieving compliance pursuant to this decision, the Board does not
18 find that the continuing validity of the Ordinance substantially interferes with the fulfillment of
19 Goals 5, 6, or 8.
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21 **II. PROCEDURAL HISTORY**

22
23 A petition for review was timely filed by The Ostrom Company on August 1, 2005,
24 challenging various features of Respondent County's Ordinance 2005-057. Petitioner
25 alleged that ordinance provisions fail to comply with three goals and several requirements of
26 the Growth Management Act (GMA) and several provisions of the Whatcom County
27 Comprehensive Plan. A Notice of Hearing and Preliminary Schedule was issued on
28 August 8, 2005. A prehearing conference was held telephonically and a Prehearing Order
29 was issued by the Board on September 9, 2005. An Index of Record was filed and
30 Additions and Supplements to the Index were added. On October 11, 2005, Respondent
31 Whatcom County filed a Motion to Dismiss Petitioner's Issues 5 and 6. Petitioner Ostrom
32

1 Company filed an Opposition to Motion to Dismiss and Declarations and attachments on
2 October 21, 2005. Following review of the motion and responses and deliberation, the
3 Board issued an Order on Motion to Dismiss on November 9, 2005; this Order dismissed
4 Issue 6 and reserved ruling on Issue 5 until the Hearing on the Merits. There followed a
5 letter ruling from the Presiding Officer on November 17, 2005, accepting earlier proposed
6 additions to the record and taking judicial notice of *Findings of Fact, Conclusions of Law,*
7 *and Order on PCHB cases 04-105 and 04-140 (The Ostrom Company v. Olympic Region*
8 *Clean Air Agency)* issued by the State of Washington Pollution Control Hearings Board on
9 September 9, 2005. Following requests to extend the deadlines for filing hearing briefs, an
10 order was issued granting short time extensions. On December 12, 2005, an Order
11 Granting Motion to Supplement the Record with the Declaration of Karen Frakes was
12 issued. Hearing memoranda and reply and response briefs were then timely filed.
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16 The Hearing on the Merits was held in Bellingham in a conference room of the Whatcom
17 County Courthouse on January 4, 2006, commencing at 10 AM. All three Board members
18 were present.
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20 **III. BURDEN OF PROOF**

21 For purposes of board review of the comprehensive plans and development regulations
22 adopted by local government, the GMA establishes three major precepts: a presumption of
23 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
24 decisions of local government.
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26
27 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations, and
28 amendments to them are presumed valid upon adoption:

29 Except as provided in subsection (5) of this section, comprehensive plans and
30 development regulations, and amendments thereto, adopted under this chapter are
31 presumed valid upon adoption.

32 RCW 36.70A.320(1).

1 The statute further provides that the standard of review shall be whether the challenged
2 enactments are clearly erroneous:

3 The board shall find compliance unless it determines that the action by the state
4 agency, county, or city is clearly erroneous in view of the entire record before the
5 board and in light of the goals and requirements of this chapter.
6 RCW 36.70A.320(3).

7 In order to find the County's action clearly erroneous, the board must be "left with the firm
8 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
9 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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12 Within the framework of state goals and requirements, the boards must grant deference to
13 local government in how they plan for growth:

14 In recognition of the broad range of discretion that may be exercised by counties and
15 cities in how they plan for growth, consistent with the requirements and goals of this
16 chapter, the legislature intends for the boards to grant deference to the counties and
17 cities in how they plan for growth, consistent with the requirements and goals of this
18 chapter. Local comprehensive plans and development regulations require counties
19 and cities to balance priorities and options for action in full consideration of local
20 circumstances. The legislature finds that while this chapter requires local planning to
21 take place within a framework of state goals and requirements, the ultimate burden
22 and responsibility for planning, harmonizing the planning goals of this chapter, and
23 implementing a county's or city's future rests with that community.
24 RCW 36.70A.3201 (in part).

25 In sum, the burden is on the Petitioner to overcome the presumption of validity and
26 demonstrate that any action taken by the County is clearly erroneous in light of the goals
27 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
28 Where not clearly erroneous and thus within the framework of state goals and requirements,
29 the planning choices of local government must be granted deference.

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IV. ISSUES PRESENTED

1. *Did Whatcom County violate the GMA's consistency requirements by adopting the Mushroom Ordinance, which is inconsistent with several Whatcom County comprehensive plan policies and Whatcom County CPPs? In particular, these include the following comprehensive plan policies and goals, CPPs and GMA Goals:*

- 2A-4 (Designate land uses that reflect the best use of the land.)
- 2A-5 (Provide predictability to property owners in land use designation.)
- 2D (Refine the regulatory system to ensure accomplishment of desired land use goals in a fair and equitable manner.)
- 2D-1 (Eliminate unnecessary regulations.)
- 2D-2 (Eliminate regulations that could be more effectively achieved through incentive or education programs.)
- 2D-3 (Streamline development regulations to eliminate unnecessary time delays.)
- 2H (Preserve private property rights while recognizing the importance of the rights of the community.)
- 2L (Recognize the important regional differences within Whatcom County.)
- 2L-5 (Emphasize agriculture in the north central regions of the county.)
- 2N-5 (Protect resource lands by controlling or buffering adjacent uses.)
- 2FF (Provide employment opportunities in the rural parts of Whatcom County.)
- 7A (Promote a healthy economy that provides ample opportunity for family-wage jobs for diverse segments of the community.)
- 7A-2 (Foster a diverse, private-sector job base... and facilitate the retention and expansion of existing businesses.)
- 7D (Strive for... overall policies, practices and regulations which do not... create costly hurdles restricting effective and desirable economic development.)
- 7D-4 (Integrate and simplify regulations.)
- 7D-7 (Streamline and coordinate the permit process.)
- 7F (Encourage development that creates local re-investment funds and provides jobs in the local community.)
- 7F-1 (Support existing local businesses as the major contributors of job creation and regeneration and afford them every opportunity to continue their success in the community.)
- 7F-2 (Encourage investments whose products and services can be marketed beyond the borders of Whatcom County, both domestically and internationally.)
- 7F-3 (Encourage firms to contribute financially as a partner with the public sector in sharing the costs for civic and cultural needs of the community at large.)
- 7F-4 (Enhance opportunities for increased resource based (agricultural, forest, fisheries and mining products) value added industries.)

- 7G-5 (Coordinate environmental and economic planning efforts.)
- 7H (To promote economic diversity, continue to support the resource industries as significant elements of the local economy including the employment base.)
- 7J-1 (Support creation of job opportunities for local residents, especially family wage jobs to decrease unemployment and underemployment.)
- 8A (Conserve and enhance Whatcom County's agricultural land base for the continued production of food and fiber.)
- 8A-2 (Long range conservation strategy should include... Required buffers on all new non-agricultural uses located adjacent to agricultural activities... [and] Farm friendly regulations....)
- 8A-4 (Discourage conversion of productive agricultural land to incompatible uses.)
- 8A-7 (Establish flexibility in land use plans and regulations to encourage maintenance of the productive agricultural land base.)
- 8B (Maintain and enhance the agricultural products industry.)
- 8B-1 (Promote the expansion and stability of local/regional agricultural economies.)
- 8C (Preserve and enhance the cultural heritage that is related to agriculture.) See also, 2J, 2J-1, 2J-2.
- 8D (Reduce land use conflicts between agriculture and non-agricultural landowners.)
- 8D-2 (Affirm and build upon the Right-To-Farm ordinance, in order to help curb pressures to convert farms to non-farm uses.)
- 8D-6 (Support agricultural activity in mixed farm/rural residential areas, with the understanding that certain farm practices may conflict with other rural land uses.)
- CPP P-1 (County should establish a pro-active process to anticipate potential takings and other private property issues and resolve them out of court.)

2. *Did Whatcom County violate the GMA's consistency requirements by adopting the Mushroom Farm Ordinance, which is inconsistent with the goals of the GMA, specifically RCW 36.70A.020 (5), (6), and (8)?*

3. *Did Whatcom County violate the GMA's requirements to protect agricultural land from adjacent land uses that interfere with "the continued use [of agricultural land], in the accustomed manner and in accordance with best management practices" under RCW 36.70A.060?*

4. *Did Whatcom County violate the GMA, specifically RCW 36.70A.106, by submitting the Mushroom Farm Ordinance for CTED review after adopting the Ordinance rather than sixty or more days prior to adoption?*

1 5. *Did Whatcom County violate the GMA, specifically RCW 36.70A.370, by failing to utilize*
2 *the process developed by the Attorney General to ensure that regulatory action does not*
3 *result in an unconstitutional taking of private property?*¹

4 V. DISCUSSION

5 Agricultural Issues – Issue 3, and Issues 1 and 2 as they pertain to Agriculture

6 **Positions of the Parties**

7
8 Petitioner argues that Ordinance 2005-057 fails to comply with GMA requirements for
9 protection and conservation of designated agricultural lands - RCW 36.70A.060 and
10 36.70A.020. Ostrom's Hearing Memorandum at 15. Petitioner challenges the buffer
11 requirements of the Ordinance as requiring the agricultural activity of mushroom substrate
12 production to "buffer itself in order to protect the adjacent non-agricultural uses." *Id.* at 16.
13 Petitioner argues that this fails to meet the mandate of RCW 36.70A.060(1) to require
14 development regulations assure that the use of adjacent lands does not interfere with the
15 use of agricultural lands. *Id.* at 17. The large buffers and setbacks, Petitioner argues, also
16 fail to meet the goal in RCW 36.70A.020(8) of maintaining and enhancing the agricultural
17 industry. *Id.*

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19
20 Petitioner also urges that the Ordinance is inconsistent with comprehensive plan policies
21 2N-5, 2L-5, 8A, 8A-2, 8A-7, 8B, 8B-1, 8C and 8D. *Id.* at 17-18. These plan policies require,
22 among other things, buffers on all new non-agricultural uses adjacent to agricultural
23 activities (8A-2), buffers on uses adjacent to resource lands (2N-5), and provide for
24 encouragement and conservation of agricultural lands (8A, 8A-7, 8B-1, and 8D). *Id.* at 18.
25 Petitioners argue that the Ordinance improperly balances competing agricultural and non-
26 agricultural interests in favor of the non-agricultural uses. *Id.* at 18-19.
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31 ¹ By Order of November 9, 2005, the Board granted Respondent County's motion to dismiss Issue 6. Order
32 on Motion to Dismiss. Issue 6 read: Did Whatcom County violate the GMA and The Ostrom Company's due
process and equal protection rights by adopting the Mushroom Farm Ordinance?

1 The County responds that the Ordinance does not affect an agricultural use because the
2 “rights of mushroom growers in Whatcom County to use their property to grow mushrooms
3 is totally unimpacted by the Ordinance.” Whatcom County’s Response Brief at 10. The
4 County urges that mushroom substrate production is a manufacturing activity rather than an
5 agricultural activity. *Id.* Even so, the County points out that it does not prohibit the
6 production of mushroom substrate – it requires that large substrate production facilities
7 locate in the “Heavy Impact Industrial” zones. *Id.* at 11. Smaller amounts of substrate
8 production may occur on designated agricultural lands, but the greater impacts of large
9 operations are segregated into heavy industrial zones. *Id.*

12 **Board Discussion**

13 RCW 36.70A.060 provides:

14
15 Each county that is required or chooses to plan under RCW 36.70A.040, and each
16 city within such county, shall adopt development regulations on or before
17 September 1, 1991, to assure the conservation of agricultural, forest, and mineral
18 resource lands designated under RCW 36.70A.170. Regulations adopted under this
19 subsection may not prohibit uses legally existing on any parcel prior to their adoption
20 and shall remain in effect until the county or city adopts development regulations
21 pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands
22 shall not interfere with the continued use, in the accustomed manner and in
23 accordance with best management practices, of these designated lands for the
24 production of food, agricultural products, or timber or for the extraction of minerals...

RCW 36.70A.060(1)(in pertinent part).

24 RCW 36.70A.040 also references these development regulation requirements:

25 ... the county and each city located within the county shall designate critical areas,
26 agricultural lands, forest lands, and mineral resource lands, and adopt development
27 regulations conserving those designated agricultural lands, forest lands, and mineral
28 resource lands and protecting these designated critical areas, under RCW
29 36.70A.170 and 36.70A.060...

RCW 36.70A.040(3)(b).

31 Goal 8 of the GMA is the natural resource industries goal:

32 Natural resource industries. Maintain and enhance natural resource-based
industries, including productive timber, agricultural, and fisheries industries.

1 Encourage the conservation of productive forest lands and productive agricultural
2 lands, and discourage incompatible uses.
3 RCW 36.70A.020(8).
4

5 In determining whether Ordinance 2005-057 fails to comply with these provisions the Board
6 must first determine whether the production of mushroom substrate on-site for on-farm use
7 is an agricultural use or activity.² Chapter 20.15 of the Whatcom County Code, adopted by
8 Ordinance 2005-057, expressly finds that mushroom substrate activity is “a manufacturing
9 activity which is not dependent upon agricultural or any other soils.” WCC 20.15.010. The
10 evidence on this issue in the record submitted by the County was primarily presented by the
11 Hopewell Neighborhood Association, including citations to scholarly authorities. Ex. 24
12 outlines the neighborhood association’s position that mushroom substrate production is not
13 farming, but a manufacturing process. The neighborhood association reasons that
14 substrate production is not agricultural activity because the ingredients for the substrate are
15 imported onto the site; mixed in specific proportions; converted into the finished medium;
16 and transferred to the operation. Ex. 24.
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20 Petitioner, on the other hand, provided evidence demonstrating that mushroom substrate is
21 the soil in which mushrooms are grown commercially:

22 Mushrooms extract their carbohydrates and proteins from a rich medium of decaying,
23 organic- matter vegetation. This rich organic matter must be prepared into nutrient-
24 rich substrate composts that the mushroom can consume.

25 Ex. 45, “Basic procedures for Agaricus Mushroom Growing,” Penn State College of
26 Agricultural Sciences, Agricultural Research and Cooperative Extension.

27 The evidence further shows that although mushroom substrate could be produced off-farm,
28 it is intimately connected with the essential nature of mushroom growing. Mushroom
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32 ² The parties appear to agree that mushroom substrate production for off-farm use is not agricultural activity.

1 composting is “a necessary component of growing mushrooms.” Ex. 663, September 23,
2 2004 letter from American Mushroom Institute, Laura Phelps, President.

3
4 While some farmers import the mushroom substrate they use, the on-site production of
5 mushroom substrate is an important activity for the mushroom farmer:

6
7 Mushroom composting, when directly associated with a growing operation, is an
8 integral part of farming mushrooms.
9 Ex. 657, September 13, 2004 Letter from Whatcom County Agriculture Preservation
10 Committee, Jason Vander Veen, President.

11 Petitioner also cites to a pollution control hearings board case - *The Ostrom Company v.*
12 *Olympic Regional Clean Air Agency*, PCHB No. 04-105, 04-40, 2005 WL 2309893. In that
13 case, the Pollution Control Hearings Board determined that mushroom substrate or compost
14 production meets the definition of “agricultural activity” in the Clean Air Act. Having
15 determined that growing mushrooms is an agricultural activity, the Pollution Control Hearing
16 Board found that the production of compost which is used in the growing, raising or
17 production of mushrooms is also agricultural activity.

18
19 After touring the facility, and listening to the testimony, the Board concludes that
20 Ostrom’s production of compost is so integral to its growing of mushrooms, that it
21 remains within the definition of “agricultural activity” contained in RCW
22 70.94.640(5)(a).

23 Conclusion of Law VIII, *Findings of Fact, Conclusions of Law, and Order*, PCHB No. 04-105,
24 04-140, September 9, 2005.

25 Similarly, Division II of the Court of Appeals found that compost production for mushroom
26 farming “occurs in connection with the commercial production of farm products” and thus
27 meets the definition of agricultural activity protected from nuisance suits by the Right to
28 Farm Act, RCW 7.48.300, .310, and .905. *Vicwood Meridian Partnership v. Skagit Sound*
29 *and Gravel*, 123 Wn. App.877, 882-3, 98 P.3d 1277(2004).
30
31
32

1 The County in its turn cites *U.S. v. Frezzo Bros., Inc.*, 546 F. Supp. 713 (E.D. Pa. 1982) for
2 the proposition that mushroom substrate production for growing mushrooms on-site is
3 manufacturing, not agricultural, activity. Whatcom County's Response Brief at 10. In that
4 case, Petitioners sought to have their criminal convictions for discharging pollutants into
5 navigable waters without a permit vacated based on an exemption from the law that they did
6 not raise in their trial. The federal district court declined to vacate the convictions on several
7 grounds and found that the production of mushroom substrate or compost as carried out by
8 the operation of the Frezzo Bros. was manufacturing rather than agricultural activity.
9 However, an important part of the federal court's analysis was that 90% of the compost
10 produced by the petitioners was sold to other users and not part of an on-farm mushroom-
11 growing operation.
12

13
14 The Board finds that the inquiry as to whether or not activity is agricultural under the GMA
15 does not rest on whether the activity could be broken into processes such as the
16 neighborhood association proposed but whether the activity is intimately connected with the
17 crop grown by the substrate producer. The Board finds that on-farm production of
18 mushroom substrate for use on that farm is an integral part of mushroom farming. It is,
19 therefore, agricultural activity for which agricultural lands must be conserved.
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21

22 The Ordinance at issue here applies to regulations on the use of designated agricultural
23 lands. The Board is not asked to determine whether the County may regulate how compost
24 production occurs – that is not a GMA issue. Rather, the question before the Board is
25 whether the County may preclude the use of a portion of designated agricultural lands for
26 agricultural activity based on the impacts of that agricultural activity on uses on neighboring
27 lands.
28
29

30 The GMA requires counties and cities to "conserve" agricultural lands. RCW 36.70A.040
31 and 36.70A.060. This conservation mandate also falls under Goal 8 of the GMA – to
32

1 maintain and enhance natural resource-based industries, to encourage the conservation of
2 productive agricultural (and other natural resource) lands and to discourage incompatible
3 uses. RCW 36.70A.020(8). This means that agricultural lands are to be conserved to allow
4 agricultural activity to occur on them.³
5

6
7 This case involves a classic clash of interests between neighboring property owners and a
8 commercial producer of agricultural products. The Legislature foresaw this kind of conflict
9 and determined that protecting agricultural uses from regulation based on the concerns of
10 neighbors is an essential part of conserving those lands for agriculture. See the notification
11 requirements of RCW 36.70A.060(1). Thus, the GMA requires the County to adopt
12 development regulations to assure that the use of lands adjacent to designated agricultural
13 resource lands shall not interfere with the use of designated resource lands for agriculture.
14 RCW 36.70A.060(1). It is the uses on adjacent lands, including residential uses, which may
15 not interfere with the use of agricultural lands for agriculture, rather than the other way
16 around.
17

18
19 The GMA limitation on the County's ability to restrict the location of agricultural activity on
20 designated agricultural lands is not unbounded, however. The County may regulate the
21 location of agricultural activity to meet best management practices. RCW 36.70A.060.
22 However, the regulation of the location of farm practices based on odor here is not based on
23 best management practices, but on the kind of complaints that may face many essential
24 agricultural activities. As the Whatcom County Agricultural Preservation Committee
25 commented:
26

27 Labeling odor originating from a farm as a "nuisance" or a "public health threat"
28 needing to be regulated by design requirements, operational controls and a
29 permitting process is a concern to us. APC recognizes that mushroom farming is
30 somewhat unique when compared to "typical" farms with respect to processes and
31

32 ³ This case does not involve the issue of critical areas protections in agricultural lands of long-term commercial
significance which would implicate additional GMA mandates.

1 associated odor production. However, odors generated by biological decay are
2 typical of all farming activities with smell and intensity being the variable factors.
3 Developing design standards to attempt to control odor from mushroom substrate
4 production could potentially become a precursor to similar controls for other more
"typical" farming activities.

5 Ex. 657.

6 Nothing in the County's argument or record indicates that Ordinance 2005-057 was based
7 on best management practices for mushroom growing. In fact, the County's planner,
8 Mr. Olason, indicated at the hearing on the merits that he was unable to determine the
9 source for best management practices for growing mushrooms.
10

11
12 Instead, it is apparent that the County adopted Ordinance 2005-057 to address the
13 complaints of neighbors. It is unfortunate that mushroom substrate production has such
14 negative impacts on surrounding residences and uses. However, on designated agricultural
15 lands, agricultural activity is a priority use, as long as undertaken in accordance with best
16 management practices.
17

18
19 By adopting regulations limiting the use of agricultural land for the agricultural activity of on-
20 farm mushroom substrate production to respond to neighbor complaints, the County has
21 failed to discourage incompatible uses and thereby failed to conserve agricultural lands.
22 While the County may impose restrictions on the location of agricultural activity on
23 designated agricultural lands based on best management practices, the buffers and
24 setbacks required here are not linked to such a determination.
25

26
27 **Conclusion:** Adoption of development regulations that restrict agricultural activity on
28 designated agricultural resource lands to reconcile agricultural activity with residential and
29 other uses on adjacent lands fails to comply with the GMA. Ordinance 2005-057 fails to
30 comply with RCW 36.70A.060(1), 36.70A.040(3), and 36.70A.020(8).
31
32

Consistency Issues – Issues 1 and 2 Pertaining to Economic Development and Property Rights

Petitioner argues that Ordinance 2005-057 violates the consistency requirements of the GMA in two ways. First, Petitioner alleges that the Ordinance violates the requirement in RCW 36.70A.040 and 36.70A.120 that development regulations be consistent with and implement the comprehensive plan. Petition for Review 3.1. Issue No. 1 lists a number of comprehensive plan policies that Petitioner alleges are inconsistent with Ordinance 2005-057.

Second, Petitioner argues that the Ordinance is inconsistent with GMA goals 5, 6, and 8 – goals pertaining to economic development, property rights and natural resource industries. RCW 36.70A.020(5), (6), and (8). Ostrom’s Hearing Memorandum at 14, 22-29 (Issue No. 2).

Because the County's comprehensive plan policies and the GMA goals are closely associated, the Board will consider Petitioner's challenges to specific plan policies along with the challenges to the related GMA goal.

Economic Development

Positions of the Parties

As to the economic development goal, Petitioner points to phrases in the GMA economic development goal that it claims is inconsistent with the adoption of this ordinance:

[e]ncourage economic development....that is consistent with adopted comprehensive plans [and] promote the retention and expansion of existing of existing business and recruitment of new businesses...

RCW 36.70A.020(5).

Ostrom Hearing Memorandum at 22.

1 Petitioner points to a number of comprehensive plan policies that also promote economic
2 development and job creation – 2FF, 7A, 7A-2, 7F, 7F-1, 7F-2, 7F-4, 7H, 7J-1, 8B, and
3 8B-1. *Id.* at 22-23. Petitioner states that the onerous setback, buffer, and variance
4 requirements in Ordinance 2005-057, coupled with the very expensive Health Ordinance
5 requirements, discourage rather than encourage the retention and expansion of existing
6 business or the recruitment of new business, specifically agricultural industries. *Id.* at 23.
7

8
9 Whatcom County responds that the GMA and comprehensive plan economic goals focus on
10 the County attaining its economic goals. “This is to be contrasted with Ostrom’s apparent
11 belief that the County is required to ensure Ostrom’s economic success” in order to maintain
12 consistency with the GMA and with Comprehensive Plan provisions.” Whatcom County’s
13 Response Brief at 23. The County further contends that it must balance interests of various
14 groups within the community and specifically the community within the agricultural zone. *Id.*
15 Some residents expressed concern about property values in the agricultural zone based on
16 substrate production, and others were concerned that mushroom substrate production
17 burdens and harms other neighboring agricultural issues. *Id.*, citing Ex. 1065.
18

19
20 The County argues that the ordinance has only placed requirements on potential
21 expansions of on-site substrate production. The County asserts the prospective impact
22 does not detract from Ostrom’s current or anticipated revenue and does not stifle its ability
23 to increase the amount of mushrooms it grows. *Id.* at 23-24.
24

25 26 **Board Discussion**

27 The GMA provides a list of 13 goals “to guide the development and adoption of
28 comprehensive plans and development regulations.” RCW 36.70A.020 (preamble). Goal 5
29 is entitled “economic development”; it provides:
30

31 Encourage economic development throughout the state that is consistent with
32 adopted comprehensive plans, promote economic opportunity for all citizens of this
state, especially for unemployed and disadvantaged persons, promote the retention

1 and expansion of existing businesses and recruitment of new businesses, recognize
2 regional differences impacting economic development opportunities, and encourage
3 growth in areas experiencing insufficient economic growth, all within the capacities of
4 the state's natural resources, public services, and public facilities.
5 RCW 36.70A.020(5).

6 Petitioner argues that the County's regulation of mushroom substrate production on its
7 property places it at an economically difficult, if not untenable, position. However, this goal
8 does not preclude a county or city from regulating the location of a specific business or
9 business activity, even if that regulation results in economic hardship. While other
10 provisions of law may affect that ability, the economic development goal of the GMA is
11 designed to promote the overall economic health of the state rather than the specific
12 interests of an individual business.
13

14
15 It is also the obligation of the local jurisdiction to balance the "numerous" goals of the GMA
16 in its development regulations. *Protect the Peninsula's Future v. Clallam County*, Court of
17 Appeals, Division II, Docket No. 31283-2-II, October 25, 2005. The County argues that it
18 balanced the interests of the community and neighboring agricultural uses as well as the
19 economic interests of Petitioner in adopting Ordinance 2005-057. Whatcom County's
20 Response Brief at 23. The County points out that it does not prohibit the production of
21 mushroom substrate on-farm by Petitioner; it only limits the amount that may be produced
22 adjacent to other uses. *Id.*
23

24
25 Economic development does not trump any other goal but is part of the overall planning
26 objectives of the County's comprehensive plan and development regulations. The fact that
27 a zoning regulation may burden a particular economic interest does not mean that the
28 County is precluded from adopting the regulation. By showing economic hardship to itself,
29 the Petitioner does not sustain its burden of proving that the challenged ordinance is
30 inconsistent with the GMA goal of economic development generally.
31
32

1 Consistency between the plan and the development regulations is required by RCW
2 36.70A.040 (requiring that initially adopted development regulations be consistent with and
3 implement the comprehensive plan) and 36.70A.130(1)(b) (requiring that any amendment to
4 or revision of development regulations “shall be consistent with and implement the
5 comprehensive plan”). Petitioner argues that Ordinance 2005-057 is inconsistent with
6 various plan policies for the promotion of economic development. Ostrom Hearing
7 Memorandum at 22-3.

9
10 This Board has held that consistency means that no feature of the plan or regulation is
11 incompatible with any other feature of the plan or regulation. *CMV v. Mount Vernon*,
12 WWGMHB 98-2-0006 (Final Decision and Order, July 23, 1998). In addition, it means no
13 feature of one plan may preclude achievement of any other feature of that plan or any other
14 plan. *Carlson v. San Juan County*, WWGMHB 00-2-0016 (September 15, 2000, Final
15 Decision and Order).

17
18 The cited economic development goals in the County’s comprehensive plan are similar to
19 the GMA economic development goal in that they are directed to the health of the economy
20 overall, not mandating the expansion of any one business or industry. See Goals and
21 Policies 2FF, 7A, 7A-2, 7F, 7F-1, 7F-2, 7F-4, 7H, 7J-1. Goal 7G further commits to
22 “coordinate economic development” with other considerations – environmental, resources
23 and other plan land uses and open space policies. Petitioner has failed to show that
24 Ordinance 2005-057 makes it impossible for the County to achieve its economic
25 development goals and policies.

27
28 **Conclusion:** Petitioner has not sustained his burden of proof that Ordinance 2005-057 is
29 non-compliant with the requirement for consistency between comprehensive plans and
30 development regulations (RCW 36.70A.040 and 36.70A.130(1)(b)) and the GMA goal of
31 economic development. RCW 36.70A.020(5).
32

1 **Property Rights**

2 Having determined that Ordinance 2005-057 fails to comply with the GMA requirements for
3 conservation and protection of agricultural lands for agricultural uses, the Board does not
4 reach the question of whether it also fails to comply with the property rights goal of the
5 GMA. RCW 36.70A.020(6):
6

7 Property rights. Private property shall not be taken for public use without just
8 compensation having been made. The property rights of landowners shall be
9 protected from arbitrary and discriminatory action.
10 RCW 36.70A.020(6).

11 Here, the property rights violation allegation rests on the Petitioner's right to conduct
12 agricultural activity on designated agricultural lands. Having found that the Ordinance is
13 non-compliant on these grounds, the Board will consider whether the continued validity of
14 the Ordinance also substantially interferes with the fulfillment of the property rights goal of
15 the GMA in its consideration of the request for invalidity below.
16

17 **Notice to Washington State Department of Community, Trade, and Economic**
18 **Development (CTED) - ISSUE 4**

19
20 **Positions of the Parties**

21 Petitioner challenges the County's compliance with RCW 36.70A.106, claiming that CTED
22 was not "fully apprised" of the County's intent because "the submitted and approved
23 Ordinances differed completely." Ostrom's Reply Brief at 29.
24

25 Whatcom County contends nothing in the statute requires additional notice to CTED where
26 changes are made to proposed development regulations and, in fact, the statute does not
27 require submission of a draft at all. *Id.* at 28. WAC 365-195-820(1) provides that
28 development regulations *may* be submitted to the department (CTED) and other state
29 agencies for comment individually as they are drafted. The statutory requirement to notify
30 the department of the intent to adopt *at least* 60 days prior to final adoption applies each
31 time any implementing regulation or amendment is proposed for adoption.
32

1 While there are differences in the two versions of the ordinance CTED received, Whatcom
2 County points out, (for example, that the buffer and setback requirements were changed
3 between the draft and final ordinance) they were not sufficient to warrant a new notification
4 of intent to CTED. Respondent cites *Low Income Housing Institute v. City of Bellevue*,
5 CPSGMHB Case No. 95-3-0011 (Final Decision and Order, July 25, 1995) to support its
6 view that not every iteration of this proposed zoning ordinance must be submitted to CTED
7 prior to its adoption. Whatcom County also relies on statements by the Central Board in
8 *Wildlife Habitat Injustice Prevention (WHIP) et al. v. City of Covington*, Case No. 01-3-0026
9 (Final Decision and Order, July 31, 2003) to support the proposition that notice of intent to
10 adopt allows the public as well as the state an opportunity to comment and influence the
11 outcome of the proposed ordinance.
12
13

14
15 Ostrom Company stresses in its hearing reply brief the differences in the submitted
16 proposed ordinance and the adopted ordinance are fundamental and asserts they are the
17 very changes that violate the GMA and are inconsistent with the County's Comprehensive
18 Plan. For example, the Rural zone setback was changed in kind and size, being increased
19 from 1000 feet to 2640 feet, making it equivalent to the buffer for the Urban Residential
20 zone. And, the first draft ordinance submitted exempted expansion of existing facilities on
21 commercial mushroom farms from the buffer and setback requirements, while the adopted
22 ordinance did not. Ostrom's Reply Brief at 28. Petitioner Ostrom Company disagrees with
23 the interpretation of the Central Board final decisions and orders cited above on which the
24 County replies for support.
25
26

27 Petitioner also relies upon this Board's decision in *Cameron-Woodard Homeowners'*
28 *Association v. Island County* for the proposition that a failure to comply with this RCW
29 36.70A.106 requirement puts the jurisdiction in non-compliance with the GMA. WWGMHB
30 Case No. 02-2-0004 (Order on Dispositive Motion, June 10, 2002).
31
32

1 **Board Discussion**

2 RCW 36.70A.106 requires that a county or city shall notify the Department of Community,
3 Trade and Economic Development (CTED) of its intent to adopt a comprehensive plan,
4 development regulations, or proposed amendments thereto, 60 days prior to final adoption.

5 (1) Each county and city proposing adoption of a comprehensive plan or
6 development regulation under this chapter shall notify the department of its
7 intent to adopt such plan or regulations at least sixty days prior to final adoption.
8 State agencies including the department may provide comments to the county
9 or city on the proposed comprehensive plan, or proposed development
10 regulations, during the public review process prior to adoption.

11 (2) ...

12 (3) (a) Any amendment for permanent changes to a comprehensive plan or
13 development regulation that are proposed by a county or city to its adopted plan
14 or regulations shall be submitted to the department in the same manner as
15 initial plans and development regulations under this section. Any amendment to
16 a comprehensive plan or developments that are adopted by a county or city
shall be transmitted to the department in the same manner as the initial plans
and regulations under this section.

17 According to the County, the first proposed version of the zoning ordinance was sent to
18 CTED on November 23, 2004. No Whatcom County adoption action took place in the 60
19 days following submission. The ordinance went through several drafts and amendments
20 prior to its final adoption on July 12, 2005. CTED did not provide any feedback to the
21 County during that seven month period. The ordinance version ultimately adopted was then
22 sent to CTED in July 2005. Whatcom County's Response Brief at 28.

23
24
25 Ostrom does not contest this chain of events but argues that the County did not give CTED
26 notice that it intended to apply its "onerous new buffer and setback requirements to existing
27 mushroom farms." Therefore the notice the County gave CTED by providing the first
28 proposed version of the ordinance was insufficient under the GMA because it did not
29 provide notice of the buffer and setback amendments. Ostrom's Hearing Memorandum at
30 30.
31
32

1 However, Ostrom cites to no provision of the law or case that supports its position. The
2 statute requires notice of the County's "intent to adopt such plan or regulations." RCW
3 36.70A.106(1). The parties agree that the initial draft of the proposed regulation was sent to
4 CTED. Ostrom argues that the subsequent changes to the proposed draft also had to be
5 sent to CTED. However, this is not part of RCW 36.70A.106(1) or the procedural guideline,
6 WAC 365-195-620.
7

8
9 The Central Board has considered this issue and determined that copies of the
10 amendments to the original submission are not required until after adoption. Since copies
11 of the adopted enactment are not required until ten days after final adoption, the Central
12 Board concludes that: "The presence of this section of the Act supports the notion that the
13 sixty-day notice of intent to adopt is in anticipation of potential changes following review and
14 comment." *Wildlife Habitat Injustice Prevention v. City of Covington*, CPSGMHB Case No.
15 01-3-0026 (Final Decision and Order, July 31, 2003).
16

17
18 The Board agrees that the statute anticipates that the adopted enactment may differ from
19 the draft initially sent to CTED. WAC 365-195-620, the procedural guideline on this point,
20 advises that the initial draft should be sent to CTED but does not recommend that
21 amendments to that draft be provided prior to enactment of the final version.
22

23 The evidence before the Board does not show that CTED or any other state agency
24 commented on the draft regulations provided by the County. Upon receipt of the County's
25 proposed draft, CTED was sufficiently apprised of the subject matter under consideration to
26 participate in the process.
27

28
29 **Conclusion:** Petitioner has failed to meet its burden of proof in showing that the County
30 failed to comply with the requirements of RCW 36.70A.106 in the adoption of Ordinance
31 2005-057.
32

Compliance with RCW 36.70A.370 - Issue 5

Positions of the Parties

Petitioner alleges that the County failed to comply with RCW 36.70A.106 in adopting Ordinance 2005-057. Issue 5. On pre-hearing motion, the County moved to dismiss this issue on the grounds that any process used by the County to consider impacts on private property cannot be reviewed due to the attorney-client privilege and the other limiting language of RCW 36.70A.370. Whatcom County's Motion to Dismiss Petitioner's Issues 5 and 6 at 4.

In the Order on Motion to Dismiss, November 9, 2005, this Board found there was insufficient information in the record, and no analysis provided by the County on the reach of the attorney-client privilege, for the Board to conclude that Issue 5 should be dismissed at that time. In that order, the Board noted the Central Board's analysis in the *Alberg v. King County*, CPSGMHB Case No. 95-3-0041(Final Decision and Order, March 16, 1993) case. There, the Central Board held that the presence of the Attorney General's Recommended Process to Avoid Takings in the record was sufficient to show compliance with RCW 36.70A.370. The Central Board held that the County in that case did not have to further demonstrate utilization of the Attorney General's process. Since there was no evidence concerning the Attorney General's process before this Board, this Board declined to dismiss this issue. Order on Motion to Dismiss, November 9, 2005

Thereafter, Respondent County submitted a declaration of a senior civil deputy prosecuting attorney setting forth her use and familiarity with the Attorney General's "Advisory Memorandum: Avoiding Unconstitutional Takings." The Board admitted the declaration as an exhibit after reviewing the County's November 23, 2005, motion to supplement the record with the declaration of Karen Frakes and the response of Petitioner. This supplemental exhibit is numbered 1066.

1 To make the showing that the Attorney General's recommended process had been
2 considered in adopting the Ordinance, the County submitted the declaration of civil deputy
3 prosecutor, Karen Frakes:

4 Prior to advising the Council regarding the ordinance at issue in this case,
5 I reviewed the Attorney General's memorandum and cases cited in that
6 memorandum. During executive session, I used the process described in the
7 Attorney General's memorandum and discussed various issues raised in the
8 memorandum with the Council prior to its adoption of the ordinance.

9 Item 4. Declaration of Karen N. Frakes (December 12, 2005).

10 The County argues that it balanced private property concerns with the host of other factors
11 before it, including complaints made by County residents and compelling health and
12 environmental concerns. The County further states the ordinance went through several
13 drafts and amendments before its final adoption and asserts there was nothing arbitrary or
14 discriminatory about the ordinance adoption. Whatcom County's Response Brief, at 25-26.

16 **Board Discussion**

17 RCW 36.70A.370 provides:

- 18
- 19 (1) The state attorney general shall establish by October 1, 1991, an orderly,
20 consistent process, including a checklist if appropriate, that better enables state
21 agencies and local governments to evaluate proposed regulatory or
22 administrative actions to assure that such actions do not result in an
23 unconstitutional taking of private property. It is not the purpose of this section to
24 expand or reduce the scope of private property protections provided in the state
25 and federal Constitutions. The attorney general shall review and update the
26 process at least on an annual basis to maintain consistency with changes in case
27 law.
 - 28 (2) Local governments that are required or choose to plan under RCW 36.70A.040
29 and state agencies shall utilize the process established by subsection (1) of this
30 section to assure that proposed regulatory or administrative actions do not result
31 in an unconstitutional taking of private property.
 - 32 (3) The attorney general, in consultation with the Washington state bar association,
shall develop a continuing education course to implement this section.
 - (4) The process used by government agencies shall be protected by attorney-client
privilege. Nothing in this section grants a private party the right to seek judicial
relief requiring compliance with the provisions of this section.

RCW 36.70A.370.

1 RCW 36.70A.370(2) requires the local government to consider impacts to private property
2 rights through utilization of the Attorney General's Advisory Memorandum prior to adoption
3 of amendments to comprehensive plan and development regulations. The word "shall" is
4 used to mandate that the government agency must act – it "shall utilize the process
5 established by subsection (1) of this section." RCW 36.70A.370(2).
6

7
8 At the same time, the statute provides that the process used by government agencies is
9 protected by the attorney-client privilege. Balancing these two competing provisions
10 requires that there be evidence that the process recommended by the Attorney General was
11 "utilized" in adopting the challenged ordinance. However, the substance of the discussions
12 with counsel is protected by attorney-client privilege.
13

14
15 The GMA does not guarantee that elected local officials will adopt an ordinance or
16 resolution that fully follows what state and local planners, attorneys, and citizens may have
17 advised or counseled a legislative body to do. Here, the County has provided evidence that
18 the Attorney General's process was used as part of the legal advice given to the County
19 Council. This meets the requirements of RCW 36.70A.370.
20

21
22 **Conclusion:** The Declaration of Karen Frakes is sufficient evidence to show that the
23 County utilized the Attorney General's recommended process to assure that regulatory and
24 administrative actions would not result in an unconstitutional taking of private property as
25 required by RCW 36.70A.370.
26

27 V. INVALIDITY

28 Although not framed as an issue in this case, Petitioner requested "an order of invalidity
29 against the County's Mushroom Farm Ordinance" in its Petition for Review. §11.5, Petition
30 for Review. Petitioner alleges that the Ordinance substantially interferes with Goals 5, 6,
31 and 8 of the GMA. §XI. Relief Sought, Petition for Review.
32

1 A growth management hearings board may determine that all or part of a challenged
2 regulation is invalid after finding non-compliance. RCW 36.70A.302(1)(a). A hearings
3 board has the authority to impose a finding of invalidity upon those parts of a
4 comprehensive plan or development regulations which it has found noncompliant if it finds
5 that "the continued validity of part or parts of the plan or regulation would substantially
6 interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1)(a) and (b).
7 The board must then specify in the final order "the particular part or parts of the plan or
8 regulation that are determined to be invalid and the reasons for their invalidity." RCW
9 36.70A.302(1)(c).
10

11
12 A determination of invalidity has the effect of preventing the future vesting of most types of
13 permit applications to the invalid comprehensive plan provisions and/or development
14 regulations until the County adopts provisions which the board finds no longer substantially
15 interfere with the goals of the GMA:
16

17 Except as otherwise provided in subsection (2) of this section and (b) of this
18 subsection, a development permit application not vested under state or local law
19 before receipt of the board's order by the county or city vests to the local ordinance or
20 resolution that is determined by the board not to substantially interfere with the
21 fulfillment of the goals of this chapter.
22 RCW 36.70A.302(3)(a).
23

24 The Board has found that invalidity is appropriate when there is a reasonable risk that the
25 continued validity of comprehensive plan provisions and/or development regulations that the
26 Board has found noncompliant will make it difficult for the county or city to engage in proper
27 planning within those goals. See *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-
28 0020c and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No.
29 04-2-0011, as examples.
30

31 This Board has also found that a determination of invalidity is appropriate where a
32 jurisdiction refuses to undertake reasonable compliance efforts and thereby substantially

1 interferes with the fulfillment of the goals of the Act. See *WEAN v. Island County*,
2 WWGMHB Case No. 95-2-0063 (Compliance Order, October 6, 1997).

3
4 Here, the Board has found that Ordinance 2005-057 fails to comply with the requirements
5 for conservation of agricultural lands and protection of those lands from incompatible uses
6 in RCW 36.70A.060, 36.70A.040, and 36.70A.020(8). Now, the Board must consider
7 whether the continued validity of the Ordinance substantially interferes with the fulfillment of
8 Goal 8 (natural resource industries) and Goal 6 (property rights) of the GMA.
9

10
11 No evidence has been submitted to the Board demonstrating that there is a reasonable risk
12 of incompatible development under the Ordinance during the remand period. Nor is this a
13 case where the jurisdiction has refused to undertake reasonable compliance efforts in
14 response to a board order. Under these circumstances, the Board finds that continued
15 validity of the Ordinance will not substantially interfere with fulfillment of Goals 6 and 8 so
16 long as the County acts expeditiously to achieve compliance. A lengthy delay in achieving
17 compliance could cause substantial interference with Goals 6 and 8; however, the Board
18 has no reason to doubt the willingness of the County to take prompt corrective action in this
19 case.
20
21

22
23 **Conclusion:** In the absence of lengthy delay by the County in achieving compliance in this
24 case, the continued validity of Ordinance 2005-057 does not substantially interfere with the
25 fulfillment of Goals 6 and 8 of the GMA. Should the County fail to achieve compliance in the
26 time period specified in the Order below, the Board will reconsider this determination.
27

28 VI. FINDINGS OF FACT

- 29
30 1. Whatcom County is located west of the crest of the Cascade Mountains and is required
31 to plan pursuant to RCW 36.70A.040.
32

2. The Ostrom Company, owner of Everson Farm, is a registered business in the State of Washington, and fully participated in the County's process for the adoption of Ordinance 2005-057.
3. Whatcom County adopted Ordinance 2005-057 (the Ordinance) to amend the County zoning code on July 12, 2005. A copy of that ordinance was sent to CTED in July 2005 following Whatcom County's legislative adoption.
4. The Ostrom Company filed a Petition for Review with the Board on August 1, 2005, and pursued its case.
5. The Ordinance precludes the use of a portion of designated agricultural lands for the on-site production of mushroom substrate for use on that mushroom farm based on the impacts of production of mushroom substrate on uses on neighboring lands.
6. The GMA requires counties and cities to "conserve" agricultural lands so agricultural activities may occur on them. RCW 36.70A.040, 36.70A.060 and RCW 36.70A.020(8)
7. Mushroom farming is an agricultural activity in Washington State.
8. Mushroom substrate is the soil in which mushrooms are grown commercially.
9. Mushroom composting which produces the substrate, when directly associated with a growing operation, is an integral part of farming mushrooms.
10. Mushroom composting on-site for on-farm use is intimately connected with the essential nature of mushroom growing; it is a necessary component of growing mushrooms.
11. Whatcom County adopted Ordinance 2005-057 to address the complaints of neighbors concerning the odor emitted by mushroom substrate production.
12. The regulation in the Ordinance of the location of farm practices on agricultural lands because of odors is not based on best management practices, but on the kind of complaints that may face many essential agricultural activities.
13. The buffers and setbacks required on designated agricultural lands upon which mushroom substrate is produced for mushroom farming on-site are not linked to a

- 1 determination that the buffers and setbacks are a best management practice for
2 mushroom farming.
- 3 14. Whatcom County did not ascertain and document best management practices in
4 mushroom farming to use as a basis for adopting Ordinance 2005-057.
- 5 15. The economic development goal of the GMA is designed to promote the overall
6 economic health of the state rather than the specific interests of an individual business
7 and does not trump other goals in the local government balancing of all goals of the
8 GMA.
- 9 16. Whatcom County Comprehensive Plan economic development policies and objectives
10 are directed to the health of the County's economy overall, and are not mandates for
11 the expansion of any one business or industry.
- 12 17. The Board does not reach the alleged property rights goal violation because it has
13 already found that the Ordinance fails to comply with the GMA requirements to
14 conserve and protect designated agricultural lands from incompatible uses. The
15 property rights goal allegation will be addressed in relation to the request for an
16 invalidity determination.
- 17 18. The parties agree that Whatcom County sent notice on November 23, 2005, to CTED
18 in the form of the first draft of the zoning ordinance regulations the County Council had
19 under consideration for adoption.
- 20 19. CTED was sufficiently apprised of the subject matter under consideration by Whatcom
21 County to participate in the public review process when that state agency received the
22 County's proposed draft amendment to its zoning ordinance.
- 23 20. The Declaration of Karen Frakes establishes that Whatcom County utilized the
24 Attorney General's recommended process to assure that regulatory and administrative
25 actions would not result in an unconstitutional taking of private property.
- 26 21. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby adopted
27 as such.
- 28
29
30
31
32

1
2
3 **INVALIDITY FINDINGS OF FACT**

- 4 1. No evidence was submitted demonstrating that there is a reasonable risk of
5 incompatible development under the Ordinance during the compliance remand period.
6 2. No evidence has been presented to show that Whatcom County has refused to
7 undertake reasonable compliance efforts.
8 3. In the absence of lengthy delay in achieving compliance, neither the natural resource
9 industry of mushroom farming nor the property rights of mushroom farmers are
10 substantially impaired by the continuing validity of Ordinance 2005-057.
11

12 **VII. CONCLUSIONS OF LAW**

- 13 A. The Board has jurisdiction over the parties and subject matter of this petition for review.
14 B. The petition was timely filed and the Petitioner, Ostrom Company, has standing to raise
15 the issues put forward in its petition for review.
16 C. The petition challenges the adoption of the County's Ordinance 2005-057, a regulatory
17 zoning ordinance, on grounds of over-reach in County regulation and inconsistency
18 with several goals and requirements of the GMA and several elements of the County's
19 Comprehensive Plan.
20 D. Adopted development regulations that restrict agricultural activity on designated
21 agricultural resource lands to reconcile agricultural activity with residential and other
22 uses on adjacent lands do not comply with the GMA. Ordinance 2005-057 fails to
23 comply with RCW 36.70A.060(1), 36.70A.040(3), and 36.70A.020(8).
24 E. Ordinance 2005-057 is compliant with the requirement for consistency between
25 comprehensive plans and development regulations (RCW 36.70A.040 and
26 36.70A.130(1)(b)) and the GMA goal of economic development. RCW 36.70A.020(5).
27 F. Whatcom County complied with the requirement to notify CTED of its intent to adopt a
28 regulatory zoning ordinance within sixty (60) days, under terms of RCW 36.70A.106.
29
30
31
32

- 1 G. Whatcom County utilized the Attorney General's recommended process to assure that
2 regulatory and administrative actions would not result in an unconstitutional taking of
3 private property as required by RCW 36.70A.370.
4 H. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby adopted
5 as such.
6

8 **INVALIDITY CONCLUSION OF LAW**

9 A. The continued validity of Ordinance 2005-057 does not substantially interfere with the
10 fulfillment of Goals 6 and 8 of the GMA provided Whatcom County acts promptly to make
11 the ordinance compliant.
12

13 **VIII. ORDER**

14 Based on the foregoing, Whatcom County is ordered to bring Ordinance 2005-057 into
15 compliance with the Growth Management Act in accordance with this decision within 120
16 days of the date of this decision. Should the County fail to achieve compliance in the time
17 period specified in the schedule below, the Board will entertain a motion with regard to its
18 invalidity determination.
19

20 The following schedule shall apply:
21

22 Compliance Due	June 13, 2006
23 Compliance Report and Index to the Record(County to file and 24 serve on all parties)	June 27, 2006
25 Any Objections to a Finding of Compliance Due	July 5, 2006
26 County's Response Due	July 25, 2006
27 Compliance Hearing (location to be determined)	August 1, 2006

28 **The Board incorporates the findings and conclusions of its Order on Motions to**
29 **Dismiss, November 9, 2005, by reference in this final decision and order. As part of**
30
31
32

1 this final decision and order, the Order on Motions to Dismiss shall also become a
2 final order upon entry of this decision.

3
4
5 Pursuant to RCW 36.70A.300 this is a final order of the Board.

6 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of
7 mailing of this Order to file a motion for reconsideration. The original and three copies
8 of a motion for reconsideration, together with any argument in support thereof, should
9 be filed with the Board by mailing, faxing or otherwise delivering the original and three
10 copies of the motion for reconsideration directly to the Board, with a copy served on all
11 other parties of record. **Filing means actual receipt of the document at the Board office.**
RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for
reconsideration is not a prerequisite for filing a petition for judicial review.

12 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
13 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
14 review may be instituted by filing a petition in superior court according to the
15 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
16 Enforcement. The petition for judicial review of this Order shall be filed with the
17 appropriate court and served on the Board, the Office of the Attorney General, and all
18 parties within thirty days after service of the final order, as provided in RCW 34.05.542.
19 Service on the Board may be accomplished in person or by mail, but service on the
20 Board means **actual receipt of the document at the Board office** within thirty days after
service of the final order. A petition for judicial review may not be served on the Board
by fax or by electronic mail.

21 **Service.** This Order was served on you the day it was deposited in the United States
22 mail. RCW 34.05.010(19)

23 Dated this 14th day of February 2006.
24
25

26 _____
Margery Hite, Board Member

27
28 _____
Holly Gadbow, Board Member

29
30 _____
Gayle Rothrock, Board Member